

DOCUMENT A00877

# **MCRR FLAGGING SERVICES AGREEMENT SOUTH COASTAL RAIL**

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## **AGREEMENT FOR PROVISION OF FLAGGING SERVICES**

This Agreement for Flagging Services (the "Agreement"), dated November XX, 2014, (the "Effective Date"), is made by and between Massachusetts Coastal Railroad, LLC, a limited liability company organized under the laws of the Commonwealth of Massachusetts having an address at 3065 Cranberry Highway, East Wareham, Massachusetts ("MCRR"), and XXXX

### **RECITALS**

WHEREAS, MCRR is party to a certain Operating Agreement (the "Operating Agreement") by and between MCRR, the Massachusetts Bay Transportation Authority, a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts having a principal place of business at 10 Park Plaza, Boston, Massachusetts (the "MBTA") and the Massachusetts Department of Transportation ("MassDOT"), pursuant to which MCRR controls operations on the rail lines between Cotley Junction (Taunton), New Bedford and Fall River, Massachusetts (the "SCL Lines"), which lines are owned by MassDOT, administered through the Operating Agreement by the MBTA and dispatched, operated and maintained as Freight Only Rail Properties by MCRR in accordance with the Operating Agreement;

WHEREAS, the Contractor is conducting and planning to conduct various projects and work efforts on the SCL Lines, including but not limited to XXXXX and such other additional work on or about the SCL Lines as may be necessary or desirable in the future (collectively, "the Work");

WHEREAS, Roadway Worker Protection rules and regulations promulgated by the Federal railroad Adminsitration ("FRA") require that a flagman be present during work that is performed on or near any active railroad right of way and that all personnel on any such right of way have received the necessary Roadway Worker Protection training and be properly equipped with safety equipment and apparel;

WHEREAS, pursuant to Sections 4.2 and 4.3 of the Operating Agreement, MCRR is required to maintain and operate the SCL Lines in accordance with all applicable rules and regulations of the FRA and other organizations having jurisdiction over any aspect of MCRR operations;

WHEREAS, upon the terms and subject to the conditions of this Agreement and the Operating Agreement, MCRR is willing to provide Flagging Personnel and Flagging Management to Contractor in connection with the Work;

WHEREAS, upon the terms and subject to the conditions of this Agreement, the Contractor is willing to accept the provision of the Flagging Personnel and Flagging Management in connection with the Work in exchange for the consideration described herein; and

WHEREAS, the Contractor is aware of the obligations of MCRR under the Operating Agreement, and except as expressly stated otherwise herein, the Contractor agrees to assume to

MCRR all the obligations and responsibilities that MCRR by the Operating Agreement assumes to the MBTA with respect to the subject matter hereof.

NOW, THEREFORE, in consideration of the premises, the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto, intending to be bound legally, hereby agree as follows:

1. Provision of Flagging Personnel and Flagging Management. MCRR agrees to provide the Flagging Personnel and to charge a fee for the Flagging Management to the Contractor to allow the Work to be performed on the SCL Lines right of way. The Contractor shall have the sole authority and responsibility to direct the Flagging Personnel in the conduct of the Work.

2. Term of Service. Beginning on the effective date, Flagging Personnel will be made available to Contractor by the designated Flagging Management representative of MCRR for such period(s) of time as the Contractor may request for the conduct of any component part of the Work. The periods of time during which Flagging Personnel shall be made available by the Flagging Management shall consist of (a) weekdays (Monday through Friday, excluding holidays recognized by MCRR) (the "Weekday Service") and (b) weekend days (Saturday, Sunday and paid MCRR holidays) (the "Weekend Service"). The hours worked by Flagging Personnel shall be invoiced on an hourly basis per Schedule 1 attached to this Agreement. Schedule 1 may be amended from time to time by the sole authority of MCRR to reflect any changes to the then current applicable hourly prevailing wage rates for the performance of Flagging services.

### 3. Cost of Services.

(a) In compensation for the Flagging Personnel and Flagging Management, Contractor shall pay, for Flagging Personnel, the labor rate(s) multiplied by the hours worked (the "Compensation") as set forth on Schedule I hereto, which Compensation shall include all benefits owing to such Flagging Personnel as set forth herein. Flagging Personnel are not employees of Contractor. In addition, Contractor shall pay an amount equal to a fixed percentage of 16% times the total cost of Flagging Personnel as compensation for the performance of Flagging Management services by MCRR:

- (i) Contractor shall pay MCRR, per Schedule 1, a labor rate per hour for each Flagging Personnel for the first eight hours of work per day of Weekday Service and shall pay overtime rates for all succeeding hours per day of such Weekday Service;
- (ii) Contractor shall pay MCRR, per Schedule 1, premium labor rate(s) per hour for each Flagging Personnel for all hours of work per day of Weekend Service.

(iii) Contractor shall pay MCRR a dollar amount for Flagging Management equal to 20% times the total cost of all charges for Flagging Personnel.

(b) Contractor shall pay MCRR for the use of the miscellaneous support items (the "Support Items") set forth on Schedule 2 hereto, in accordance with the charges set forth opposite each Support Item on Schedule 2 (collectively, the "Support Item Charges").

(c) Contractor acknowledges that Contractor shall be obligated to pay (i) the applicable Schedule 1 labor rate per hour for all hours that the Flagging Personnel may work in performing the Work and the applicable dollar amount equal to 16% times the total charges for Flagging Personnel for the provision of Flagging Management services, and (ii) the hourly rate set forth on Schedule 2 for the use of any Support Item beyond the number of hours set forth opposite each Support Item on Schedule 2, provided that MCRR shall, in its sole discretion, determine whether all or any of the Flagging Personnel or Support Items are available beyond the days and/or hours provided herein.

4. Payment. Contractor shall pay the Compensation and Support Item Charges to MCRR as follows: on the Effective Date, Contractor shall pay by check one hundred percent (100%) of the total Flagging Personnel, Flagging Management and Support Item Charges incurred prior to the Effective Date plus a retainer of \$5,000, all as reasonably determined by MCRR. Contractor shall pay any additional costs or expenses incurred by MCRR or the Flagging Personnel or Flagging Management in connection with the performance of this Agreement, including but not limited to travel, meals and lodging, by check within fifteen (15) days after receipt of an invoice therefor from MCRR. The failure of the Contractor to pay the Compensation or Support Item Charges and reimburse any other expenses of MCRR in accordance with the terms hereof shall constitute a material default of this Agreement.

5. Term. This Agreement shall be in effect for a term of one year from the Effective Date (the "Term"), unless sooner terminated pursuant to Section 14 hereof. Any extension of the Term shall be effective only if the parties mutually agree in writing to such extension.

6. Authority for the Work. The Work shall be conducted under the exclusive direction and control of the Contractor, who is solely responsible for determining the scope and manner of the Work. Any knowledge that MCRR acquires regarding the Work shall not make MCRR responsible or liable for errors, acts or omissions in the Work. MCRR shall not have control or charge of means, methods, techniques, sequences, procedures, safety precautions or programs implemented in connection with the Work, and MCRR shall not be responsible for the acts or omissions of Contractor, subcontractors of Contractor, or any other person performing any of the Work and for which Contractor is legally liable. Contractor's scope direction to Flagging Personnel and Flagging Management shall be limited to identifying the location(s) where the Contractor is performing the Work.

## 7. Responsibilities of Contractor.

(a) Contractor is solely liable for, and shall promptly pay, all taxes, licenses, costs, expenses and fees of every nature incurred by or imposed on Contractor in the course of the Work, including but not limited to the Compensation and Support Item Charges, and the cost of any other labor, materials or other elements used in the Work.

(b) Contractor shall exercise all due diligence and care with regard to the Work. Contractor shall perform the Work and direct the Flagging Personnel and Flagging Management in strict compliance with all applicable federal, state and local statutes, ordinances, codes, rules and regulations. Under no circumstances shall MCRR be responsible or liable for errors, acts or omissions regarding the Work.

**8. Representations or Warranties.** MCRR represents and warrants that the Flagging Personnel and Flagging Management shall be properly skilled and trained for the purpose for which they are being provided. Contractor understands that a flagman must be present during work that is performed on or near active railroad right of way pursuant to the Roadway Worker Protection rules. Contractor agrees to require it's personnel to follow all directions and instructions of any Flagging Personnel employed by MCRR to enforce these rules. MCRR shall be responsible for the acts, errors or omissions of the Flagging Personnel and Flagging Management in the enforcement of Roadway Worker Protection rules. MCRR makes no other representations, and expressly disclaims any and all other warranties, with respect to the Flagging Personnel and Flagging Management or the quality or workmanship of any services which the Flagging Personnel perform for the Contractor under this Agreement. The provisions of this Section 8 expressly survive the termination of this Agreement.

**9. Safety.** The Contractor shall be fully responsible for and implement all health and safety precautions required for the Work. Without limiting the generality of the foregoing, the Contractor shall comply with all applicable laws, ordinances, rules, regulations and orders issued by a public authority, whether federal, state, local or otherwise, including but not limited to, the Federal Railroad Administration, the Federal Transit Administration and the Occupational Safety and Health Act and those required in the conduct of operations or adjacent to railroad rights of way and, in addition to the foregoing, all safety measures identified by Contractor, including but not limited to the Owner's Right of Way Safety Certification Program and the Contractor Safety Awareness Certification Program.

#### **10. Insurance.**

(a) During the term of this Agreement, the Contractor shall maintain at a minimum:

(i) Commercial general liability (CGL) insurance protecting against all claims which might arise from or out of the Work, including but not limited to the involvement of the Flagging Personnel and Flagging Management in the Work, including premises operations, independent contractors, products-completed operations, personal injury, bodily injury, death or property damage (including loss of use thereof), blanket contractual liability and subject to limits of not less than one million dollars (\$1,000,000) inclusive per occurrence;

- (ii) railroad protective liability insurance, subject to limits of not less than five million dollars (\$5,000,000) inclusive per occurrence;
- (iii) motor vehicle insurance subject to limits of not less than one million dollars (\$1,000,000) inclusive per occurrence;
- (iv) Workers' compensation or FELA insurance, premises operations, independent contractors, products-completed operations, personal injury,;
- (v) Commercial umbrella, subject to limits of not less than ten million dollars (\$10,000,000);
- (v) Such other insurance as MCRR may reasonably request.

(b) The Contractor shall furnish MCRR with certificates of insurance evidencing such coverage and naming MCRR and MBTA each as an additional insured (except for workers compensation policy). Each insurance policy shall include the provision that such insurance shall not be canceled or materially changed without at least thirty (30) days written notice to MCRR. All of the Contractor's insurance shall be primary and non-contributing for any claims arising out of Contractor's services. The Contractor shall provide MCRR with a vicarious liability endorsement for the Contractor's Workers' Compensation or FELA policies, as applicable. The Contractor waives all rights of subrogation for recovery of damages to the extent those damages are covered by commercial general liability, business, auto liability or workers' compensation, FELA or employers liability insurance maintained pursuant to these requirements.

(c) Nothing contained in this Agreement shall in any way act as a limitation of the Contractor's liability for damage or injury, including death, which arises out of or is the result of the Contractor's acts or omissions under this Agreement.

## 11. Indemnification, Hold Harmless.

(a) The Contractor, for itself and on behalf of its agents, employees, subcontractors and subconsultants, shall indemnify, defend and hold MCRR and the MBTA, and each of their agents, consultants, officers, directors, representatives, employees, assigns and successors-in-interest, harmless to the fullest extent provided by law from and against any and all losses, expenses, costs, damages, claims, demands, fines, penalties, liens or any and causes of action, including but not limited to attorneys' fees and costs of collection, pertaining to or in any way arising out of this Agreement and asserted against MCRR or the MBTA by any person (including without limitation, any claims by MCRR's own employees) for injury to persons (including but not limited to the Flagging Personnel and Flagging Management), including death, or for loss of or damage to property or the loss of use thereof, to the extent caused by the acts or omissions of the Contractor, or any of the Contractor's subcontractors, employees, agents or other persons or entities for whose acts the Contractor may be liable. The indemnification required by this Section 11 shall not be limited in any way by the limits, terms or conditions of any insurance policy. Contractor will defend all such claims at its own cost and expense and reimburse MCRR for any attorneys' fees incurred by MCRR with respect to any such claim.

The parties specifically agree that this indemnification also includes indemnification against and from any and all claims and suits, and any and all liability for loss or expense arising from or incidental to or in connection with any environmental damage. Notwithstanding the foregoing, the Contractor shall not be required to indemnify or defend the MCRR or MBTA against claims resulting from the sole negligence of their agents, consultants, officers, directors, representatives, employees.

(b) The Contractor shall pay for all costs associated with the Work, including but not limited to costs for labor, materials and equipment, and Contractor shall defend and indemnify MCRR and the MBTA against and save them harmless from and against any and all claims, suits or liens therefore brought by the Contractor's subcontractors, consultants, agents or employees, or any other person or entity.

(c) The provisions of this Section 11 shall survive the termination of this Agreement.

**12. Damages.** The Contractor expressly agrees to reimburse MCRR for any liquidated, consequential or other damages that the MBTA, the Federal Railroad Administration or other third parties may assess against MCRR or which are incurred by MCRR and which are attributable to or caused by the Contractor's acts or omissions. In no event shall MCRR be liable for any liquidated, consequential or other damages that the Contractor may incur in connection to the Agreement or the subject matter hereof.

**13. Venue.** Any action, suit or other legal proceeding with respect to this Agreement shall solely be brought in the Superior Courts for the Commonwealth of Massachusetts. The parties consent to and accept the jurisdiction of each of such courts and waive any objection (including any objection to venue or any objection based upon the grounds of *forum non conveniens*) which might be asserted against the bringing of any such action, suit or other legal proceeding in such courts. Service of process in any such action, suit or other legal proceeding may be made by mailing copies thereof by registered or certified mail to the address provided for the giving of notices hereunder or in any manner permitted by law.

**14. Termination.** Either party may terminate this agreement upon ten (30) days' written notice to the other party hereto. Notwithstanding any other provision of this Agreement, MCRR may terminate this Agreement immediately if (a) Contractor fails to make payment in accordance with this agreement, (b) MCRR believes that the Flagging Personnel and Flagging Management are not being used by the Contractor in accordance with the terms hereof, or (c) MCRR determines, in its sole discretion, that the operation of the SCL Lines requires the return of the Flagging Personnel and Flagging Management. In the event of the return of such personnel to MCRR operation of the SCL Lines, MCRR may elect to terminate the Work until further notice as an alternative to terminating this Agreement. In no event shall MCRR be liable to the Contractor for any damages, whether special, consequential, or otherwise, that Contractor may incur as a result of MCRR's termination of this Agreement in accordance with the terms hereof.

**15. Representations and Warranties of the Contractor.** The Contractor hereby represents and warrants to MCRR:

(a) The Contractor is a corporation duly organized and existing under the laws of the state of Massachusetts.

(b) The Contractor has full power and authority to enter into and perform this Agreement.

(c) The execution and performance of this Agreement will not violate or result in a default, either immediately or with the giving of notice or the passage of time, under any other material agreement by which the Contractor is bound.

(d) The person executing this Agreement on behalf of the Contractor is duly authorized to do so under the laws, articles of incorporation, bylaws or other governing instrument applicable to the Contractor.

(e) Neither this Agreement nor any other document delivered by the Contractor contains an untrue statement of material fact or omits to state a material fact required to be stated herein or therein or necessary to make the statements herein or therein, in light of the circumstances under which they were made, not misleading.

16. Status. The Contractor specifically agrees that it is not an agent, employee or a joint venture partner of MCRR.

17. Severability. In the event that any part, term or provision of this Agreement not essential to its overall purpose is determined by a court of competent jurisdiction to be unlawful or unenforceable, the validity and enforceability of the remaining portions or provisions shall not be affected thereby.

18. Entire Agreement. This Agreement constitutes the entire agreement between the parties and shall supersede all previous agreements or understandings with respect to the subject matter hereof. No oral statement or prior written matter will have any force or effect. The parties hereby acknowledge that they are not relying on any representations or agreements other than those contained in this Agreement. This Agreement shall not be modified except in writing signed by both parties.

19. Headings. The headings used in this Agreement are included solely for convenience and shall not be used in connection with the interpretation hereof,

20. Assignment. The Contractor may not assign, transfer or delegate its rights, obligations or duties under this Agreement without the express written consent of MCRR.

21. Successors and Assigns. This Agreement shall be binding upon the heirs, court-appointed representatives, assigns and successors of the parties hereto.

22. Notice. Notice shall be deemed to have been duly served if delivered in person to the individual or individuals identified below, or if delivered to the individuals identified below

by recognized national overnight courier service.

23.

If to MCRR:            Massachusetts Coastal Railroad  
                          3065 Cranberry Highway, Unit 5  
                          East Wareham, MA 02538  
                          Attention: Andrew J. Reardon

If to Contractor:

24. Governing Law. This Agreement shall be construed in accordance with the laws of the Commonwealth of Massachusetts, without regard to its conflicts of law principles.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their proper officers or duly authorized agents as of the day and year first above written.

MCRR:

MASSACHUSETTS COASTAL RAILROAD

By: \_\_\_\_\_  
Name: Andrew J. Reardon

CONTRACTOR:

XXXX

By: \_\_\_\_\_  
Name:  
Title:

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